Petition

81-2068

No.

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ALEXANDER L. STEVAS

In The

Supreme Court of the United States

October Term, 1981

JAMES RUTUELO,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION—SECOND DEPARTMENT

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QUESTIONS PRESENTED

1. Whether the petitioner's rights under the Fourth Amendment of the United States Constitution were violated by virtue of a search and seizure pursuant to a search warrant which was predicated upon information supplied by an informer whose reliability was not sufficiently established?

2. Whether the failure of the officers executing the search warrant to follow strict statutory and constitutional guidelines required suppression of the evidence seized pursuant to that warrant?

3. Whether the state courts properly permitted the use of a so-called declaration against penal interest to support a search warrant?

PARTIES

The parties in the Appellate Division of the Supreme Court of the State of New York were James Rutuelo and The People of the State of New York, as represented by the District Attorney of the County of Kings.

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No.

In The

Supreme Court of the United States

October Term, 1981

JAMES RUTUELO,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION—SECOND DEPARTMENT

OPINION BELOW

No opinion was written in the court below. The memorandum of no opinion and affirmance is reproduced in the appendix, as is the order affirming the judgment of conviction, both dated January 25, 1982.

JURISDICTION

A. The judgment of conviction was rendered the 5th day of September, 1980, convicting petitioner, upon his plea of guilty, of criminal possession of stolen property in the first and second degrees and criminal possession of a weapon in the third degree, before Justice Hayes of the Supreme Court, Kings County.

The petitioner was sentenced to 5 years probation and a $1,000 fine.

The petitioner was arrested for allegedly acting as a "fence" since the indictment claimed that he was in criminal possession of stolen property at an establishment known as "Empire Gun and Coin Shop", located in Kings County.

B. The order and judgment of affirmance of the New York Supreme Court, Appellate Division—Second Department, was made the 25th day of January, 1982 and contained no opinion. A certificate denying leave to appeal was executed on the 12th day of March, 1982, by Associate Judge Jacob D. Fuchsberg of the New York Court of Appeals.

Copies of the aforesaid orders are annexed as part of the appendix.

C. Jurisdiction to review the order and judgment in question by certiorari is conferred under 28 U.S.C. §§1254 and 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth, Fifth and Fourteenth Amendments of the United States Constitution are involved herein, the pertinent portions of which are set forth in the appendix.

STATEMENT OF THE CASE

Two burglars were arrested by the police on April 26, 1979, and told the authorities that they had sold the proceeds of a burglary to an establishment known as "Empire Gun and Coin Shop" in Brooklyn, New York.

Predicated upon this information, the police obtained a search warrant authorizing a search of that establishment.

Accompanied by the alleged victim of the burglary, the officers entered the "Empire Gun and Coin Shop", where this alleged victim identified certain property as her own. Some of this property was in plain view and other property was in a desk drawer. Also seized was a second-hand dealer's book which was required to be kept by the New York City Administrative Code.

Petitioner, the husband of the owner of the shop, was arrested and subsequently charged in an eight-count indictment with criminal possession of stolen property in the first and second degrees (one count of each) and criminal possession of a weapon in the third degree (six counts).

A motion to controvert the warrant was made upon the grounds that the affidavit in support of the search warrant was constitutionally defective and that the warrant was unlawfully executed. The motion also sought the return of wrongfully seized property to its true owner, Barbara Rutuelo, the wife of petitioner.

After a hearing, the motion was denied with respect to the property initially identified by Ms. Santigata. The "court. . . only passed upon the right of the seized property to be admitted into evidence at the trial. . . [stating that t]he proper action for the return of the property should be under Article 71 of the CPLR".

The search warrant, which is crucial to this petition, was supported by an affidavit of a Detective Hughes which, in pertinent part, stated the following:

> "On April 26, 1979, at approximately 10:00 A.M., your deponent arrested one Juan Orlando, of 50-21 7th Avenue, Brooklyn, New York, County of Kings, for Burglary in the Third Degree, Section 140, of the New York State Penal Law. Juan Orlando stated to your deponent that he and one other (Frank Saffiotti) committed a burglary at 149-68th Street Brooklyn, New York at approximately 1:00 P.M. on April 25, 1979, and that he delivered and sold the proceeds of that burglary to the Empire Gun and Coin Shop, located at 5524 8th Avenue, County of Kings, at approximately 4:30 P.M. on April 25, 1979. Juan Orlando further stated that he was present on two other occasions when stolen property was sold to the manager of the Empire Gun and Coin Shop. The manager is known as 'Al' described as 6'1" tall, 200 lbs. approximately 45 years of age and is believed to be the husband of the owner of the Empire Gun and Coin Shop, one Barbara Rutuelo.
>
> Also arrested on April 26, 1979 at approximately 11:00 A.M. was Frank Saffiotti of 1368 44th Street, Brooklyn, New York, County of Kings. Frank Saffiotti stated to your deponent that he and one other (Juan Orlando) committed a burglary at 149-68th Street, Brooklyn, New York at approximately 1:00 P.M. on April 25, 1979, and that he delivered and sold the proceeds of that burglary to the Empire Gun and Coin Shop, located at 5524 8th Avenue, County of Kings, at

approximately 4:30 P.M. on April 25, 1979. Frank Saffiotti stated to your deponent that he stole property on two prior occasions and sold said property to the manager of the Empire Gun and Coin Shop.

The proceeds of the burglary committed at premises 149 68th Street, Brooklyn, New York on April 25, 1979 is enumerated in Schedule 'A' which is annexed hereto and made a part hereof.

Based upon the foregoing reliable information, there is probable cause to believe that such property is stolen and illegally possessed and may be found in premises known as the Empire Gun and Coin Shop, located at 5524 8th Avenue, Brooklyn, New York, County of Kings."

After the warrant was issued, Hughes and two other officers went to the Empire Gun and Coin Shop, the place to be searched, arriving there at about 6:30 P.M. A copy of the warrant was displayed to petitioner, who stated that his wife owned the establishement, but that he was in charge.

The officers then proceeded to conduct the search. A tea set and a quantity of assorted jewelry was found in the back room (*ibid.*). The property was placed on a counter in the front of the store and Ms. Santigata, the alleged victim, was called in to make a positive identification of her property.

Ms. Santigata, in fact, identified several items as those taken in the burglary at that time. These items were separated, taken, and vouchered at the precinct. The remaining items of jewelry,

which were comingled with Ms. Santigata's property, were taken and vouchered separately because Detective Hughes "*believed these items were stolen*".

On May 3, 1979, after the return was made on the warrant, Ms. Santigata identified two more pieces of jewelry, previously listed in the return as "unknown", as hers.

During the search, the police also discovered several handguns. Five were located in a desk where petitioner was seated when they entered, another handgun was hanging on the wall. Petitioner stated that he did not have a license for the guns and that one, a .357 Smith and Wesson, was used for protection. The six guns were seized and vouchered.

Petitioner's wife, Barbara Rutuelo, provided Detective Hughes with a second-hand dealer's book when the detective requested it. Detective Hughes noticed that the property seized was not listed in the book. The book was then taken as well.

A return on the warrant — a list of all items vouchered, with the exception of the second-hand dealer's book — was made and given to Judge Down on May 3, 1979.

Petitioner's wife took the stand at the hearing and explained how the search was conducted. Despite the statutory mandate, no receipt was given for the property taken, a fact corroborated by Detective Hughes' testimony. The burglars, Orlando and Saffiotti, had previously done business with her store.

It was stipulated that Ms. Rutuelo had viewed the property seized at the Property Clerk's Office and claimed that certain items belonged to her.

REASONS FOR GRANTING THE WRIT

I.

The affidavit in support of the search warrant did not sufficiently establish the reliability of the informer, thus mandating suppression of all evidence seized pursuant to the warrant.

It is a fundamental principle, long since established by this Court, that all searches without a valid warrant are unreasonable unless shown to be within one of the exceptions to the rule that a search must rest upon a *valid* warrant and the burden is on the officer to shown that the search comes within such an exception. *See Stoner v. California,* 376 U.S. 483, 84 S. Ct. 889; *United States v. Jeffers,* 342 U.S. 48, 72 S. Ct. 93; and *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S. Ct. 2022.

It is not contested in the case at bar that there are no exceptions to the warrant requirement herein, and thus it is patent that unless the warrant herein was valid, the search and seizure and arrest predicated thereon violated the Fourth, Fifth and Fourteenth Amendments of the United States Constitution.

The affidavit in support of the search warrant "disclosed" the names of the "informants", but the purported statements were not made under oath and were clearly hearsay. Under such circumstances, the so-called *Aquilar-Spinelli (Aquilar v. Texas,* 378 U.S. 108; *Spinelli v. United States,* 393 U.S. 410; *see, e.g., People v. Elwell,* 50 N.Y. 2d 231, 236-237; *People v. Hanlon,* 36 N.Y. 2d 549) two-pronged test must be applied [*cf., People v. Hicks,* 38 N.Y. 2d 90, 94 (citizen-informant's statement given under oath); *People v. Parliman,* 56 A.D. 2d 966, 967 (same)].

While the basis of knowledge prong is satisfied because it is clear that the informants were speaking from first-hand

knowledge (*People v. Munger,* 24 N.Y. 2d 445), Criminal Term erred in finding the veracity prong satisfied on the theory that they were speaking against their equal interests.

True, the Supreme Court's plurality opinion in *United States v. Harris,* 403 U.S. 573, 583-584, states that a declaration against penal interest can generate a sufficient guarantee of the informant's reliability. But the Court itself cautioned that "admissions of crime do not always lend credibility to contemporaneous or later accusations of another" (403 U.S. at 584).

Thus, where the informant is involved in the criminal activities under investigation, a "statement against penal interest, although it is entitled to some weight, cannot alone establish his reliability under *Aguilar" (United States v. Martin,* 615 F. 2d 318, 326). "[S]tanding alone, a statement against penal interest is 'not enough to justify a finding of probably cause;' rather it is 'one of many cumulative factors to be considered' " (*id.* at 325, *quoting United States v. Ashley,* 569 F. 2d 975, 982, *cert. denied,* 439 U.S. 853). As the Fifth Circuit explained in *Martin (id.* at 325-326):

> "Under these circumstances, there exists a danger that the informant sought to implicate another in order to curry the favor of the police and perhaps gain immunity for himself. While such motivations do 'not eliminate the residual risk and opprobrium of having admitted criminal conduct,' . . ., they certainly make the declaration less reliable."

Additionally, there is no claim herein that the petitioner lacked standing since he was in charge of the "Empire Coin and Gun Shop" and his standing was never contested (*United States v. Salvucci,* 448 U.S. 83, 100 S. Ct. 2547; *Simmons v. United States,* 390 U.S. 377, 88 S. Ct. 967).

Moreover, the nature of the search conducted herein was far broader than permissible under the Fourth Amendment since it appeared to be a general search rather than for specific property, especially in view of the fact that the trial court suppressed a number of items of the property that was seized (*Go-Bart v. United States,* 282 U.S. 344, 51 S. Ct. 153; *Stanford v. Texas,* 379 U.S. 476, 85 S. Ct. 506; *Berger v. New York,* 388 U.S. 41, 87 S. Ct. 1873).

Additionally, the affidavit supporting the warrant was not specific enough to satisfy the *strictissimi juris* requirements of the Fourth Amendment which mandate that great particularity and specificity be included before a warrant could be held valid (*Stanford v. Texas, supra; See v. Seattle,* 387 U.S. 541, 87 S. Ct. 1737; *Lo-Ji Sales Inc. v. New York,* 442 U.S. 319, 99 S. Ct. 2319; and. *Berger v. New York, supra).*

A.

Declarations Against Penal Interest Inadmissible Here

Declarations against penal interest are notoriously unreliable when their source emanates from a captured criminal who obviously is seeking his own release or to attenuate the gravity of his own exposure. (*See Ohio v. Roberts,* 448 U.S. 56, 100 S. Ct. 2531; *People v. Settles,* 46 N.Y. 2d 154, 412 N.Y.S. 2d 874, 882; *United States v. Alvarez,* 584 F. 2d 694 (2 Cir. 1978); and, *People v. Geoghegan,* 51 N.Y. 2d 45; *cf., Dutton v. Evans,* 400 U.S. 79, 91 S. Ct. 210, wherein this Court sanctioned the use of extra-judicial statements characterized as declarations against penal interest, but subsequent cases such as *Ohio v. Roberts, supra,* clearly indicate that the reliability is of paramount consideration, and that is lacking herein.)

In *People v. "H",* N.Y.L.J. 4/27/82, p. 13 (Supreme Court, Kings County), the court notes that the Supreme Court has never

definitively ruled on the admission of declarations against penal interest. *See California v. Green,* 399 U.S. 149.

Moreover, there is a serious question as to whether or not the court properly employed the concept of declaration against penal interest, especially since the statements were not corroborated by circumstances clearly indicating trustworthiness; nor does it indicate that the statements were necessarily believed to be true by the declarants, and, finally, there is a serious question as to whether or not the declarant was unavailable.

If the court below is referring to declarations of the petitioner himself, obviously that is not a declaration against penal interest, but would be characterized as either a confession or an admission, but that is not the case herein. *See United States v. Alvarez,* 584 F. 2d 694 (2 Cir. 1978), where the Court of Appeals explained:

> "Thus, the general test has three parts: (1) the declarant must be unavailable; (2) the statement must so far tend to subject the declarant to criminal liability that a reasonable person in his position would not have made the statement unless he believes it to be true; and (3) the statement must be corroborated by circumstances clearly indicating its trustworthiness."

The United States Court of Appeals in *Alvarez* cogently added:

> "But it does not follow that the test is to be applied identically in all respects to inculpatory as to exculpatory statements against interest. Alvarez simply holds that the Sixth Amendment requires that inculpatory statements against penal interests be corroborated by circumstances indicating their

> trustworthiness; *it does not hold that Sixth Amendment confrontation values may not require more. Nor does it imply that the reliability and trustworthiness test is the same for exculpatory and inculpatory statements.*" (Emphasis ours.)

Cf., Rule 804(b)(3) Federal Rules of Evidence.

Accordingly, the declarations should not have been admitted.

II.

The motion to suppress should have been granted in its entirety because of the failure of the officers executing the warrant to follow the statutory mandates relating to receipts.

CPL 690.50, subdivision 4, mandates that:

> "Upon seizing property pursuant to a search warrant, a police officer must write and subscribe a receipt itemizing the property taken. . . . If property is taken from a person, such receipt must be given to such person. If property is taken from premises or a vehicle, such receipt must be given to the owner, tenant or other person in possession thereof if he is present. . . ."

Despite the statutory mandate, Detective Hughes could not remember whether such a receipt was given. Petitioner's wife said distinctly that no such receipt was, in fact, issued. In any event, the People did not establish that this requisite was followed.

The lower courts of this state have held such a defect to be ministerial. Because the requirement is statutory, these courts have said that the failure to comply will not per se render the search

unreasonable under the Fourth Amendment *(People v. DiPolito,* 61 Misc. 2d 65; *People v. Rose,* 52 Misc. 2d 648; *cf., People v. Galleges,* 80 Misc. 2d 265).

But these cases cannot be read as holding that in all circumstances the courts will blink at the violation. As observed in Ringel, *Searches and Seizures, Arrests and Confessions,* [1979 ed.], §4.3(c), p. 4-22:

> "These rules are mandatory, however, and courts may suppress evidence at their discretion where necessary to protect the integrity of the judicial process or to prevent abusive police conduct."*

Suppression should be applied here because "there has been prejudice to the defendant" and, moreover, it appears that the "noncompliance has been deliberate or in willful disregard of the rules" (*ibid.*). No remedy short of complete suppression will suffice.

Detective Hughes correctly applied for a search warrant. The issuance of that warrant, however, did not give *carte blanche* to seize things because he "believed these items were stolen". The requirement of a receipt forces the executing officer to compare the items listed on the warrant with the items seized. It "slows up", so to speak, the grabbing or overreaching practice. The warrant here sought the proceeds of a specific burglary, not a wholesale rummage sale.

In short, the statutory requirement of the issuance of a receipt was violated. As an appellate court, this Court should, once and

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* Ringel actually discusses the effect of Rules 41(c) and (d) of the Federal Rules of Criminal Procedure, which impose the same requirement of receipts in federal proceedings.

for all, breathe life into CPLR 690.50, subdivision 4. If police officers recognize that suppression can result from its violation, we can be assured that the statute will be followed [*cf., People v. Harris,* 48 N.Y. 2d 208 (Cooke, Ch. J., concurring and dissenting)].

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioner

APPENDIX

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Due Process Clause of the Fifth Amendment:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law."

Fourteenth Amendment:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CERTIFICATE DENYING LEAVE OF COURT OF APPEALS, STATE OF NEW YORK DATED MARCH 12, 1982

STATE OF NEW YORK

COURT OF APPEALS

BEFORE: HON. JACOB D. FUCHSBERG, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

against

JAMES RUTUELO

I, JACOB D. FUCHSBERG, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied. Insufficient ground indicated for an oral hearing of this application.

Dated at New York, New York
March 12, 1982

s/ Hon. Jacob D. Fuchsberg
Associate Judge

---

* Description of Order: Order of the Appellate Division, Second Department, dated January 25, 1982 affirming judgment of the Supreme Court, Kings County rendered on September 5, 1980.

ORDER AND JUDGMENT OF AFFIRMANCE OF APPELLATE DIVISION, SECOND DEPARTMENT DATED JANUARY 25, 1982

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on January 25, 1982.

HON. DAVID T. GIBBONS, Justice Presiding,
HON. FRANK A. GULOTTA,
HON. FRANK D. O'CONNOR,
HON. LAWRENCE J. BRACKEN.
Associate Justices

The People of the State of New York,
Respondent,

v.

James Rutuelo,
Appellant.

In the above entitled action, the above named James Rutuelo, defendant in this action, having appealed to this court from a judgment of the Supreme Court, Kings County, rendered September 5, 1980; and the said appeal having been submitted by Irving Anolik, Esq., of counsel for the appellant and submitted by Cynthia Kean, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed.

Enter:

Clerk of the Appellate Division

Order and Judgment

E/ms

DAVID T. GIBBONS, J.P.
FRANK A. GULOTTA
FRANK D. O'CONNOR
LAWRENCE J. BRACKEN, JJ.

_____AD2d_____ S - December 1, 1981

3221 E The People, etc., respondent,
v James Rutuelo, appellant.
(Ind. No. 2167/79)

Irving Anolik, New York, N.Y., for appellant.

Elizabeth Holtzman, District Attorney, Brooklyn, N.Y. (Cynthia Kean of counsel), for respondent.

Judgment of the Supreme Court, Kings County (HAYES, J.), rendered September 5, 1980, affirmed. No opinion.

GIBBONS, J.P., GULOTTA, O'CONNOR and BRACKEN, JJ., concur.

January 25, 1982 PEOPLE v RUTUELO, JAMES 3221 E

Opposition

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No. 81-2068

In The

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JAMES RUTUELO,

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—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION — SECOND DEPARTMENT.

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Questions Presented

1. Whether an affidavit for a search warrant, predicated upon declarations against penal interest, presents a substantial constitutional question in light of *United States* v. *Harris*, and its progeny?

2. Whether the ministerial error of failing to give a receipt for property seized raises a substantial constitutional question?

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Preliminary Statement

This brief is submitted in opposition to a petition for a writ of certiorari to review the judgment of the Supreme Court of the State of New York, Appellate Division, Second Department, which affirmed a judgment convicting petitioner of Criminal Possession of Stolen Property in the Second Degree (two counts) and Criminal Possession of a Weapon in the Third Degree (5 counts), and sentencing him to five years' probation and a one thousand dollar fine.

Opinions Below

No opinion was written in the court below. The memorandum of affirmance appears in Petitioner's Appendix, p. 3a.

Jurisdiction

The judgment of the Appellate Division was entered on January 25, 1982, and a certificate denying leave to the Court of Appeals was issued on March 12, 1982. Jurisdiction is invoked under 28 U.S.C. § 1257. Petitioner incorrectly invokes jurisdiction under 28 U.S.C. § 1254, which applies to review of a federal court of appeals decision.

Statement of Facts

Petitioner James Rutuelo was convicted on September 5, 1980, on a plea of guilty, of Criminal Possession of Stolen Property in the Second Degree (two counts) [New York Penal Law § 165.45] and Criminal Possession of a Weapon in the Third Degree (five counts) [New York Penal Law § 265.02]. Before pleading guilty, he moved to suppress certain property seized pursuant to a warrant from a gun and coin shop owned by petitioner's wife. This property consisted of various items of jewelry, watches, a tea service, several handguns, and a second-hand dealer's book. He claimed, in part, that the warrant authorizing seizure of the property was not based on probable cause. The trial court denied the motion. On appeal, petitioner challenged that ruling as permitted by state law. New York Criminal Procedure Law § 710.70(2). The Appellate Division rejected this claim.

Detective Hughes' affidavit in support of the warrant is repeated here in its entirety.

> On April 26, 1979, at approximately 10:00 A.M., your deponent arrested one Juan Orlando, of 50-21 7th Avenue, Brooklyn, New York, County of Kings, for Burglary in the Third Degree, Section 140. of the New York State Penal Law. Juan Orlando stated to your deponent that he and one other (Frank Safflotti) committed a burglary at 149-68th Street, Brooklyn, New York at approximately 1:00 P.M. on April 25, 1979, and that he delivered and sold the proceeds of that burglary to the Empire Gun and Coin Shop, located at 5524 8th Avenue, County of Kings, at approximately 4:30 P.M. on April 25, 1979. Juan Orlando further stated that he was present on two other occasions when stolen property was sold to the manager of the Empire Gun and Coin Shop. The manager is known "Al" described as 6' 1" tall, 200 lbs, approximately 45

years of age and is believed to be the husband of the owner of the Empire Gun and Coin Shop, one Barbara Rutuelo.

Also arrested on April 26, 1979, at approximately 11:00 A.M. was Frank Saffiotti of 1368 44th Street Brooklyn, New York, County of Kings. Frank Saffiotti stated to your deponent that he and one other (Juan Orlando) committed a burglary at 149-68th Street, Brooklyn, New York at approximately 1:00 P.M. on April 25, 1979, and that he delivered and sold the proceeds of that burglary to the Empire Gun and Coin Shop, located at 5524 8th Avenue, County of Kings, at approximately 4:30 P.M. on April 25, 1979. Frank Saffiotti stated to your deponent that he stole property on two prior occasions and sold said property to the manager of the Empire Gun and Coin Shop.

The proceeds of the burglary committed at premises 149-68th Street, Brooklyn, New York on April 25, 1979, is enumerated in Schedule "A" which is annexed hereto and made a part hereof.

Based upon the foregoing reliable information, there is probable cause to believe that such property is stolen and illegally possessed and may be found in premises known as the Empire Gun and Coin Shop, located at 5524 8th Avenue, Brooklyn, New York, County of Kings.

WHEREFORE, I respectfully request that the court issue a warrant and order of seizure, in the form annexed, authorizing the search of the Empire Gun and Coin Shop, located at 5524 8th Avenue, County of Kings, State of New York and directing that if such property or evidence or any part thereof be found therein or thereat, that it be seized and brought before the court; together with such other and further relief that the court may deem proper.

No previous application in this matter has been made in this or any other court or to any other judge, justice or magistrate.

Also included in the search warrant was a schedule of partial proceeds of the burglary, provided by Mildred Santagata, the victim. Detective Hughes informed the issuing magistrate that one of the informants and Mr. and Ms. Santagata were waiting outside the courthouse should the court wish to examine them. The court apparently did not examine these witnesses.

Shortly after the warrant was issued, Detective Hughes proceeded to the Empire Gun and Coin Shop and presented a copy of the warrant to petitioner. Petitioner stated that his wife owned the shop but that he was responsible for everything on the premises. After the police began the search, Ms. Santagata, who had been waiting outside, was brought into the shop where she identified certain property as hers. The police seized the property identified by Ms. Santagata, other articles of jewelry, some of it compressed or mutilated, as well as several handguns and a second-hand dealer's book, required to be maintained under the New York City Administrative Code. A return on the warrant, listing all of the items vouchered, with the exception of the second-hand dealer's book, was made to Judge Dowd on May 3, 1979.

Detective Hughes did not recall whether he gave a receipt for the property taken to petitioner or to his wife. Petitioner's wife, Barbara Rutuelo, testified that she was not given a receipt for the property taken. Petitioner did not testify at the hearing.

The court refused to suppress the property identified by Ms. Santagata, the handguns and the second-hand dealer's book. The court suppressed all other items seized. The court also declined to rule on the return of the suppressed property to Ms. Rutuelo, finding that the proper action for the return should be under Article 71 of the New York Civil Practice Law and Rules.

REASONS FOR DENYING THE WRIT

POINT I

The Search Warrant, Supported In Part By Two Informants' Declarations Against Penal Interest, Was Issued On Probable Cause.

There is no substantial question about the sufficiency of the affidavit to support the search warrant.

Hearsay in an affidavit for search warrants is sufficient to establish probable cause as long as both the reliability of the informant and the reliability of the information are established. *Aguilar* v. *Texas*, 378 U.S. 108 (1964); *Spinelli* v. *United States* 393 U.S. 410 (1969). Petitioner concedes that the information's reliability was established by the informants' first-hand observations. The reliability of the informants, as admitted perpetrators of a burglary only the day before the warrant was issued, was also established. Their declarations against penal interest were corroborated by each other's story as well as by a list of partial proceeds provided by Ms. Santagata.

In *United States* v. *Harris*, 403 U.S. 573, 583 (1971), the plurality opinion held that

> Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility—sufficient at least to support a finding of probable cause to search.

In *Harris*, this Court found that an unnamed informant's admission that he had been buying illicit whiskey from the defendant's premises "itself and without more, implicated that property and furnished probable cause to search." *United States* v. *Harris*, 403 U.S. at 584. *See also Agnellino* v. *New Jersey*, 493 F.2d 714 (3d Cir. 1974); *United States* v. *Brown*, 455 F.2d 1201 (9th

Cir.), *cert. denied*, 406 U.S. 960 (1972); *People* v. *Wright*, 37 N.Y.2d 88 (1975).

The affidavit in the case at bar provided more indicia of reliability than were provided in *Harris*. Each informant confirmed the information provided by the other. *People* v. *Wheatman*, 29 N.Y.2d 337 (1971). As to each, the information provided was a declaration against penal interest. *United States* v. *Harris*, *supra*; *People* v. *Wright*, *supra*; *People* v. *Hanlon*, 36 N.Y.2d 549 (1975). Their statements may be considered reliable even though they might be in a position of currying favor with authorities. *People* v. *Rodriguez*, 52 N.Y.2d 483, 489 (1981). Both informants admitted being at the location and selling stolen property on two prior occasions, thereby increasing the reliability of their information. *United States* v. *Harris*, 403 U.S. at 584. Informant Orlando's reliability was further established by his providing a detailed description of petitioner, whom he believed to be the husband of the premises' owner, Barbara Rutuelo. *People* v. *Hanlon*, *supra*; *Draper* v. *United States*, 358 U.S. 307 (1959). The reliability of Orlando and Saffiotti was additionally insured because they risked criminal prosecution for Falsely Reporting an Incident if their reports were fabricated. New York Penal Law § 240.50.

In addition to the statements of Orlando and Saffiotti, Detective Hughes attached a schedule of the property taken from Ms. Santagata's home, thereby providing the issuing magistrate with some independent verification by the affiant. Furthermore, had the issuing court desired additional information, it could have questioned the victim and an informant, both of whose names were known to the court and were waiting outside the courthouse.

Appellant's reliance on *United States* v. *Martin*, 615 F.2d 318 (5th Cir. 1980) is misplaced. Although there the court stated, in seeming contradiction to the law as enunciated in *United States* v. *Harris*, *supra*, that a

declaration against penal interest, standing alone, will not justify a finding of probable cause, the warrant at issue was ultimately upheld since the declaration was corroborated, establishing probable cause in the affidavit's entire context. In the case at bar there is also corroboration, both from the other informer's similar declaration and from the attached list of stolen property.

Petitioner's arguments that declarations against penal interest are notoriously unreliable and that the declarations in the instant case did not comply with the standards for admitting such declarations are also without merit. Petitioner, in citing cases construing trial evidence, relies on a strained analogy between such declarations used in warrants and at trial.* Furthermore, the various circuit courts and New York courts agree as to the reliability of declarations against penal interest in search warrant applications. *See, e.g., United States* v. *Farese*, 612 F.2d 1376 (5th Cir. 1980); *United States* v. *Midtaune*, 589 F.2d 370 (8th Cir. 1979); *United States* v. *Rueda*, 549 F.2d 865 (2d Cir. 1977); *United States* v. *Mackin*, 502 F.2d 429 (D.C. Cir), *cert. denied*, 419 U.S. 1052 (1974); *Agnellino* v. *New Jersey, supra; United States* v. *Brown, supra; People* v. *Rodriguez, supra; People* v. *Hanlon, supra; People* v. *Wright, supra.*

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* Unlike a trial, which requires proof of guilt beyond a reasonable doubt, a warrant may be granted simply upon a showing that probable cause exists to believe that the specified property will be found at the specified premises. *Aguilar* v. *Texas, supra.* The evidence to support this finding of probable cause need not be of the type admissible at trial. *Brinegar* v. *United States*, 338 U.S. 160, 175 (1949). Hearsay is sufficient to support a finding of probable cause. *United States* v. *Harris, supra; Spinelli* v. *United States, supra.* Furthermore, cases construing the admissibility of declarations against penal interest at trial stress the importance of the Sixth Amendment's Confrontation Clause, which is not implicated in an application for a search warrant. U.S. Const. Amend. VI; *United States* v. *Harris, supra* at 584.

Finally, there is no merit to petitioner's suggestion that the scope of the search was too broad. Attached to the search warrant was a list of approximately ninety items to be seized. The items were grouped into specific categories and were more or less described in shape and color, the information having been obtained from the victim herself. Such a listing of items was specific enough to satisfy the constitutional requirements. *Steele* v. *United States*, 267 U.S. 498 (1928); *United States* v. *Scharfman*, 448 F.2d 1351 (2d Cir. 1971).

The warrant was issued upon probable cause, and the items seized were thus properly ruled admissible.

POINT II

The Claim That The Receipt Was Not Given For The Seized Property Presents Only An Issue Of State Law And Does Not Challenge The Reasonableness Of The Search. Moreover, That Issue Is Barred By State Procedural Default.

Petitioner's claim that he did not receive a receipt for the items seized pursuant to a search warrant under New York Criminal Procedure Law § 690.50(4) does not set forth a constitutional claim, and should not be reviewed by this Court. *Henry* v. *Mississippi*, 379 U.S. 443 (1965); *Wainwright* v. *Sykes*, 433 U.S. 72, 81-82, 86-87 (1977). Furthermore, petitioner's failure to raise this issue in conformity with state procedural requirements, resulting in the Appellate Division's refusal to address the matter, established an adequate and independent state ground for the decision below, which precludes review by this Court. *Wainwright* v. *Sykes*, 433 U.S. at 86-87. Petitioner never raised the issue before the trial court; and when it was raised on appeal, the People argued that the issue had not been preserved for appellate review in accordance with

state procedural requirements. New York Criminal Procedure Law § 470.05; *People* v. *Martin*, 50 N.Y.2d 1029 (1980); *People* v. *Tutt*, 38 N.Y.2d 1011 (1976).* It may be inferred from the Appellate Division's affirmance without opinion that that court applied the procedural bar. *County Court of Ulster County* v. *Allen*, 442 U.S. 140, 151-154 (1979).

Even assuming, *arguendo*, that the issue had been presented and preserved, and even assuming that the police had not in fact served the receipt, the omission, a ministerial error, would not render the search unreasonable and constitutionally defective. U.S. Const. Amend. IV. *United States* v. *Harrington*, 504 F.2d 130 (7th Cir. 1974); *United States* v. *Klapholz*, 17 F.R.D. 18 (E.D.N.Y. 1955), *aff'd*, 230 F.2d 494 (2d Cir.), *cert. denied*, 351 U.S. 924 (1956); *People* v. *Einhorn*, 75 Misc.2d 183 (S. Ct. N.Y. 1973); *People* v. *DiPolito*, 61 Misc.2d 65 (Rochester City Court, 1969); *People* v. *Rose*, 52 Misc.2d 648 (D. Ct. Nassau County, 1967).

Despite petitioner's bald assertions, petitioner has not made, and could not make, any showing that he was prejudiced by not getting a receipt or that the noncompliance was wilful, especially here, where petitioner was shown a copy of the warrant and a return was made. Even petitioner recognizes that such a showing must be made before a court, in its discretion, should suppress evidence. Petitioner's Petition for a Writ of Certiorari, p. 12.

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* As a consequence of petitioner's not having raised this issue in his motion, the prosecution did not establish whether or not the receipt had in fact been given. Detective Hughes testified only that he did not recall whether or not he left a receipt. None of the other officers present at the search was called to testify whether or not they had left a receipt. Petitioner, who was also present at the premises, did not testify.

Petitioner has not presented any issue of constitutional dimension for review by this Court.

CONCLUSION

The Petition For Certiorari Should Be Denied.

Dated: Brooklyn, New York
June, 1982

Respectfully submitted,

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